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No. 375

In the Supreme Court of the United States

OCTOBER TERM, 1959

SAFEWAY TRAILS, INC., APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND THE BALTIMORE AND ANNAPOLIS RAILROAD CO.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

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Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the judgment of a special statutory three-judge district court sustaining an order of the Interstate Commerce Commission awarding appellee The Baltimore and Annapolis Railroad Co. ("Railroad") a certificate of public convenience and necessity to extend its motor-carrier bus operations.

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Prior to the instant proceeding, the Railroad had authority to operate buses as a common carrier between Baltimore and Annapolis, Maryland, over a series of routes including those serving Glen Burnie, Md., and Fort Meade.[1] On January 10, 1957, it applied for a certificate covering three additional routes, thereby extending its existing routes between Glen Burnie and Fort Meade to Washington, D.C., and enabling it to provide through service between these two (as well as certain intermediate) points and Washington (J.S. 23a–25a). After hearing, a Maryland and District of Columbia Joint Board recommended (J.S. 23a–34a) that the certificate be granted for two of the routes, finding that there was no need for additional service on the third (J.S. 32a). On exceptions, Division 1 of the Commission adopted the joint board's recommendations (J.S. 7a–13a).

On reconsideration, the full Commission affirmed (J.S. 14a–22a). It held (J.S. 19a) that the existing service between Washington and Glen Burnie was "patently inadequate," since "passengers on public vehicles are subjected to inconvenient, time-consuming, and sometimes expensive interchanges, and prospective passengers are discouraged from using the existing public transportation services"; that "a rather widespread desire for the proposed service exists"; and that "the proposed service * * * would fulfill a demonstrated need for such service."

[1] The Railroad conducts some freight, but no passenger, operations by rail (J.S. 16a–17a, 20a).

The three-judge district court unanimously upheld the order. In a comprehensive opinion by Circuit Judge Washington (J.S. 1a–6a), the court fully considered and rejected appellant's challenges to the order. The court, on the basis of its own review of "the administrative record, including the recommended report of the Joint Board, the report of Division 1 of the Commission, and the report of the Commission, as well as the testimony taken in the proceedings" (J.S. 6a), concluded that the Commission "did not exceed its authority, and had a rational basis for its action" (*ibid.*).

ARGUMENT

1. Appellant contends (J.S. 9–12) that the Commission, in granting the certificate for the new operating authority, improperly refused to consider its offer to enter into a through route with the Railroad—a route over which, allegedly, the same service could be provided. It argues, on the basis of the Commission's factual statement that this proposal was not acceptable to the Railroad, that the Commission erroneously held that it has no power, in a certification proceeding under Section 207(a) of the Interstate Commerce Act (49 U.S.C. 307(a)), to consider a proposal to establish through routes as a ground for rejecting the proposed service.

This argument misconceives the basis of the Commission's rejection of appellant's proposal. The Commission did not rule that it has no power to consider a through-route proposal in a certification proceeding, but merely declined to deny an application for needed service because of the through-route offer. In fact, in

at least two other cases it has denied certificate applications for precisely that reason (*Tri-State Transit Co., of La., Inc., Extension—Holly Springs,* 11 M.C.C. 285, 292; *Missouri Pac. Transp. Co. Extension—Natchez-New Orleans,* 9 M.C.C. 712, 714–715). Four of the dissenting Commissioners here similarly would have denied the application on that ground (J.S. 21a–22a).

While Section 216(a) of the Act (49 U.S.C. 316(a)) imposes a "duty" on motor carriers "to establish reasonable through routes with other such common carriers," Section 216(e) (49 U.S.C. 316(e)) establishes a specific procedure which a carrier seeking to compel the establishment of through routes must follow. It must file a complaint with the Commission, and in the ensuing proceedings it has the burden of proof that the through route sought is "necessary or desirable in the public interest." Appellant, however, filed no complaint under Section 216(e), but instead attempted to inject the through-route issue into the certification proceedings as a ground for defeating the application. If the Commission had permitted appellant thus to raise the issue, the burden of proof would have been put on the Railroad to show why it should not be required to enter into such an arrangement. In the circumstances, we submit that the district court correctly held that the Commission "was well within its authority and discretion in declining to consider Safeway's request in detail, and in granting the operating authority to the Railroad to establish its own service" (J.S. 4a–5a). Thus, to the extent that appellant may be arguing that, as a matter of law, the Commission

was required to make detailed findings on appellant's through-route offer, the answer is, as the court below pointed out (J.S. 4a–5a), that the Interstate Commerce Act imposes no such limitations or obligations.

2. Appellant challenges the Commission's failure to consider, in determining whether public convenience and necessity required the certification of the Railroad, the alleged adverse competitive effect of such certification upon appellant's existing charter and special services operating out of the City of Washington.[2] Under Section 208(c) of the Act (49 U.S.C. 308(c)), a motor common carrier's certificate authority to transport passengers to and from specified points also authorizes it to transport "special or chartered parties." Appellant states (J.S. 12), that the Railroad plans to "compete actively for the existing special and charter business"; and it argues (J.S. 13) that the Commission could have "restrict[ed] the Railroad from competing for special and charter business within Washington, D.C." pursuant to its authority, under Section 208(a) of the Act (49 U.S.C. 308(a)), to impose upon certificates "such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require * * *."

From the outset of motor carrier regulation, however, the Commission has uniformly held that its gen-

[2] A carrier conducts "charter service" when it hires its bus to a person for a given operation selected by the hirer. When the carrier itself sells tickets to individual passengers desiring a journey designated by the carrier (as in sightseeing buses) this is a "special operation". See *Fordham Bus Corp.* v. *United States*, 41 F. Supp. 712, 717 (S.D.N.Y.).

eral authority under Section 208(a) to impose "terms, conditions and limitations" upon certificates does not permit it to restrict a carrier's statutory right to conduct special or charter operations to and from points which it is certificated to serve. See *Peninsula Transit Corp. Common Carrier Application*, 1 M.C.C. 440, 442; *Regulations Governing Special or Chartered Party Service*, 29 M.C.C. 25, 46; *The Baltimore and A.R.Co. Extension—Fort George G. Meade*, 63 M.C.C. 357, 366. While the Commission has, since 1955, annually requested Congress to change the Act so that special and charter rights would not automatically flow from a route award (see, *e.g.*, 72nd Annual Report of the Interstate Commerce Commission, p. 136 (1958)), Congress has not done so. Moreover, in favorably reporting a bill (S. 1459, 85th Cong., 1st Sess.) to require applicants "to show a need for the service of transporting special or charter parties," the Senate Committee on Interstate and Foreign Commerce expressly recognized that "the right to transport special or chartered parties is actually an incident to the right granted * * * to engage in the transportation of passengers by motor vehicle over regular routes between fixed termini." (S. Rep. No. 465, 85th Cong., 1st Sess. (1957), p. 2.)

In the circumstances, the court below correctly held (J.S. 6a) that the Commission's settled interpretation of Section 208(c) as a "mandatory provision granting the Commission no authority to place any limitation in a certificate which would restrict charter privileges * * * is a reasonable one within the scope of the power and discretion conferred by the gov-

erning statute;" and properly declined "now [to] consider whether some other construction of Section 208(a) would be permissible."[3]

3. Finally, appellant challenges (J.S. 14–17) the holding below (J.S. 2a) that "ample evidence" supports the Commission's finding that the existing service is inadequate. The court below reached this conclusion after reviewing the entire "administrative record" (J.S. 6a), the conclusion is correct, and there is no occasion for a second re-examination of the record by this Court. See *Federal Trade Commission* v. *Standard Oil Co.*, 355 U.S. 396, 401; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.[4]

[3] Appellant's contention (J.S. 13) that, even if the Commission had no authority to limit the Railroad's special and charter operations, it nevertheless should have considered the effect of such operations as an element of public convenience and necessity in passing on the certificate application, is but another formulation of its main argument. Since a carrier's special and charter rights are merely incidental to, and flow directly from, its certificate authority, a new route service required by the public convenience and necessity cannot be rejected merely because of the effect of the incidental special and charter authority thereby conferred upon such incidental authority of other carriers.

[4] Appellant also contends (J.S. 16) that since the Commission found inadequacy of service only "between Washington and Glen Burnie" and not between Washington and Fort Meade, it was not warranted in authorizing service to the latter point—a contention not made either before the Commission or the district court. The short answer, as the district court pointed out (J.S. 2a), is that the finding of inadequacy between Washington and Glen Burnie, when read in conjunction with the reports of the Joint Board and Division 1 (which discussed the inadequacy of service to Fort Meade, J.S. 8a, 9a, 10a–11a, 12a–13a, 29a–30a, 32a–33a), was sufficient to authorize service to Fort Meade.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the district court is correct and should be affirmed.

Respectfully submitted.

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